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No. 1041

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

NEZ PERCE TRIBE OF INDIANS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Claims

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Petitioner, the Nez Perce Tribe of Indians of Idaho, prays that a writ of certiorari issue to the Court of Claims to review the judgment of the Court entered in the above-entitled case on July 15, 1966.

OPINION BELOW

The opinion of the Court of Claims, July 15, 1966 (as yet unreported) is reprinted as Appendix A below.

JURISDICTION

The judgment of the Court of Claims was entered on July 15, 1966. Rehearing was denied on November 10, 1966. Jurisdiction is invoked under Section 20 of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. § 70s(c), and 28 U.S.C. § 1255.

STATUTE INVOLVED

Agreement of May 1, 1893, ratified by Act of August 15, 1894, 28 Stat. 286, 326-332, I Kapp. 536, reprinted as Appendix B.

QUESTION PRESENTED

Where under an 1894 agreement with an Indian Tribe the United States buys certain land, promising to pay part of the proceeds at once, and to place the balance in the Treasury in trust for the Indians at interest, and where the price paid is so inadequate that additional compensation is later awarded by the Indian Claims Commission, does the original promise to pay interest on the balance apply to the additional compensation, so as to place the Indians in the same position that they would have been in had they been paid adequately in the first place?

STATEMENT OF THE CASE

The Nez Perce Indians, formerly one of the proud tribes of the Northwest, today reside on scattered individual allotments in the northern part of Idaho, near Lewiston. Aboriginally they occupied a vast area in Washington, Idaho and Oregon. The pressure of white settlement led to the first cession in 1855,[1] whereby the Indians ceded some of their land, and kept the rest, about 7,000,000 acres, as a reservation. Gold was discovered on this reservation in 1860, which led to uncontrolled white trespasses, trouble, and eventually another cession in 1863.[2] This cession reduced the Indians' reservation to 762,000 acres.[3]

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[1] Treaty of June 11, 1855, 12 Stat. 957.

[2] Treaty of June 9, 1863, 14 Stat. 647.

[3] This background is detailed in *Nez Perce Tribe* v. *United States*, 3 Ind.Cl.Com. 571 (1955); *Nez Perce Tribe* v. *United States*, 8 Ind. Cl.Com. 220 (1959); and *Nez Perce Tribe* v. *United States*, 13 Ind. Cl.Com. 184 (1964). The latter is the instant case.

Unfortunately for the Indians, their 1863 reservation still contained good lands coveted by the white settlers, and this resulted in the final disappearance of the Nez Perce reservation as a tribally-owned unit. Under the Agreement of 1894,[4] each adult Indian was allowed to select an allotment, and the checkerboarded remainder, some 549,559 acres, was thrown open to white settlement. The Indians were paid $2.97 per acre.[5]

In 1951, pursuant to the Indian Claims Commission Act,[6] the Nez Perce Tribe filed a claim with the Indian Claims Commission. The Indians claimed the true value of the land they ceded was much greater than $3.00 per acre. They alleged fraud, duress, unconscionable consideration, unilateral mistake, and sought to recover "just compensation."[7]

Article 3 of the 1894 Agreement provided that out of the money to be paid to the Indians, $626,222 was to be paid to the individual Indians per capita as soon as practicable, and

> "The remainder of said sum of [$1,626,222] shall be deposited in the Treasury of the United States to the credit of the 'Nes Perces Indians, of Idaho,' *and shall bear interest at the rate of five per centum per annum,* which principal and interest shall be paid to said Indians per capita as follows, to wit: At the expiration of one year from the date of the ratification of this agreement the sum of fifty thousand dollars, and semi-annually thereafter the sum of one hundred and fifty thousand dollars, and semi-annually thereafter the sum of one hundred and fifty thousand dollars with the interest on the unexpended

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[4] Appendix B; 28 Stat. 286, 326-332.

[5] The Agreement called for $3.00 per acre, but the amount actually paid was $2.97. Appendix A p. 14.

[6] 60 Stat. 1049 (1946), 25 U.S.C. § 70.

[7] Petition, p. 4.

> portion of the fund of one million dollars until the entire amount shall have been paid. . . ." (Emphasis added)[8]

The Indians asked the Commission not only to award additional compensation for the land, but also to award interest on such additional compensation, to place them in the same position they would have been in had they been paid their due in 1893. They referred to the Indian Claims Commission Act, which expressly authorizes the Commission to hear and determine.

> ". . . (3) claims which would result if the treaties, contracts and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether in law or fact, or on any other ground cognizable by a court of equity; . . ."[9]

The Indians argued that their claim for interest should be allowed on the grounds that if the Agreement were revised to provide for a fair price for the land, that part of the price which exceeded $626,222 would draw interest under the express terms of the Agreement.[10]

The majority opinion of the Commission held that the Indians had been paid $2.97 per acre, that the land was worth no more than $4.00, and that the difference was not great enough to justify a recovery for the Indians.[11] Consequently, they did not reach the interest claim. However, Commissioner Scott, in a separate opinion, assumed the validity of the interest claim; he said:

> "If the agreement was considered as revised on the basis of unconscionable consideration, and it could

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[8] 28 Stat. at 329, Appendix B at p. 32.

[9] 25 U.S.C. § 70a(3).

[10] Brief before Commission, October 24, 1961, pp. 122, 150.

[11] 13 Ind.Cl.Comm. at 264.

be assumed this amount was deposited in the Treasury in 1894 and left there by the Nez Perce at the rate of 5% provided in the agreement until 1964, and compounded annually, they would have $17,222,-749.47 to their credit." [12]

Commissioner Scott used a compound interest factor; however, the Indians claim only 5% simple interest (which would amount to about 350% over the 70 years that the Indians have been deprived of their fair compensation). Incidentally, the majority of the Court of Claims, as discussed at p. 6 below, calculated that the extra consideration would probably have been paid out to the Indians over five years, and thus would have earned only about $200,000.[13]

The Indians appealed. They argued:

(1) The land was worth much more than the $4.00 per acre found by the Commission.

(2) Even if the land was worth only $4.00, still that meant the Indians were paid $566,000 less than they should have been paid, and that amount was sufficiently large to be "unconscionable."

(3) Whatever additional sum the Indians were awarded should bear interest (on the grounds explained above).[14]

The Court of Claims handed down its opinion on July 15, 1966. It intimated in very strong terms that it thought the land was worth more than $4.00 an acre,[15]

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[12] Id. p. 269.

[13] Appendix A, p. 25.

[14] Brief before Court of Claims, June 3, 1965, p. 84.

[15] For example, ". . . unlike the Commission, we think this [$4.00 per acre] is a minimum figure." Appendix A, p. 15.

Also, ". . . the evidence shows that the land was worth a minimum and not a maximum of $4 per acre . . ." Id. p. 19.

[Footnote continued on page 6.]

indicating possibly that it was worth $5.00 to $7.00.[16] However, it stated that the $4.00 figure was "supported by substantial evidence." [17]

In discussing the second issue, whether $2.97 was an unconscionable price for lands worth a minimum of $4.00, the Court indicated its clear feeling that the $2.97 was unconscionable (because at $4 per acre the Indians received $566,000 less than they were entitled to), reversed the Commission, and remanded for further proceedings in conformity with the opinion.

The Court also disposed of the interest issue, rejecting the Indians' claim, on the ground that the Agreement called for a price of exactly $1,626,222 and that the interest clause applied only to this sum, and not to the greater sum that would have been paid had the Agreement been revised to provide for payment of the fair market value of the land.[18]

Motion for rehearing was denied November 10, 1966, and this petition for certiorari was duly filed.

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[15] Continued

Also, ". . . it is possible to come up with . . . $5 to $7." Id. p. 21.

Also, ". . . the very size of the premium here suggests that the bargain [for the U.S.] was too good." Id. p. 23.

Also, ". . . the $4 per acre figure . . . is a bare minimum," and ". . . the evidence would support a higher value." Id. p. 25.

Also, ". . . no reasonable seller in a willing transaction under any circumstances would have parted with ownership of the ceded area for less than $4 per acre." Id. p. 26.

[16] Appendix A, p. 21.

[17] Id. p. 22.

[18] Appendix A, pp. 26-28.

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Claims Conflicts with the Decisions of this Court and with Its Own Decisions

In *United States* v. *Blackfeather*,[19] a decision of this Court, the United States entered into a treaty with the Shawnee Indians, whereby the Indians ceded lands to the United States and the United States agreed to sell such land at public sale to the highest bidder. The net proceeds of sale were to constitute[20]

> ". . . a fund for the future necessities of said tribe, parties to this compact, on which the United States agree to pay to the chiefs, for the use and general benefit of their people, annually, five per centum on the amount of said balance, as an annuity."

Instead of auctioning the lands as required by the treaty, the United States sold most of them at private sale at a flat $1.25 per acre. The lower court held this was a breach of agreement, and that the Indians were entitled to recover the additional amount they would have received had the lands been auctioned.

The Indians claimed interest under the treaty clause quoted above. This Court held that the quoted clause was an agreement to pay interest, and that under it the Indians were entitled to interest. This Court held:[21]

> "If the government had originally accounted for the whole amount for which the court below held it to be liable, it would have paid five per cent upon this amount until the whole fund was paid over. The fund as to this amount being not yet distributed, the obligation to pay the five per cent annuity con-

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[19] 155 U.S. 180 (1894).

[20] 155 U.S. at 188.

[21] 155 U.S. at 193.

tinues until the money is paid over. Upon the whole, we think the court did not err in allowing interest."

In *Mille Lac Indians* v. *United States*,[22] a statute authorized obtaining a cession of land from the Indians, and the auctioning of such land to the public.[23] The proceeds were to be placed in the Treasury at 5% interest. Certain lands were not sold in accordance with the statute. The Court awarded the value of the land as if it had been sold in accordance with the statute, and allowed 5% interest thereon.

In *Peoria Tribe* v. *United States*,[24] the United States agreed to sell some Indian land at public auction, and to pay the Indians the net proceeds. Instead, the United States sold it to settlers at appraised prices. The Indian Claims Commission found that the true value of the land was $172,726.04 more than the Indians had received, and awarded that amount to the Indians.

The Indians claimed interest on the basis of the treaty involved, which said:

> "And as the amount of the annual receipts from the sales of their lands, cannot now be ascertained, it is agreed that the President may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds of said sales shall be paid them, and how much shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement." [25]

The Indians argued that this language amounted to an agreement to pay interest on the proceeds of sale, and

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[22] 47 Ct.Cl. 415, 462 (1912), reversed other grounds, 229 U.S. 498 (1913), further proceedings, 51 Ct.Cl. 400, 407-408 (1916).

[23] 25 Stat. 642 (1889).

[24] Ct.Cl., Dec. 16, 1966, as yet unreported.

[25] 10 Stat. 1082, Article 7.

that the additional payment of $172,726.04 was in effect proceeds of sale.

Three of the judges ruled against the Indians on the ground that the President had been given discretion whether to pay over the proceeds or invest them at interest, and since he was not required to do the latter, there was no agreement to pay interest. *Blackfeather*[26] was distinguished on the ground that the treaty there unequivocally promised to pay interest on the proceeds.

Two judges dissented. They thought the possibility that the President might elect to pay the additional proceeds direct to the Indians was "most unlikely," and therefore, in all probability, he would have invested the proceeds, and therefore the Indians should have the interest.

It is impossible to reconcile the foregoing cases. Interest was allowed in *Blackfeather* and *Mille Lac*, and denied in *Peoria* and the instant case. In each case the United States failed to pay enough money to the Indians at the time of the transaction. In each case additional money was awarded by the court acting under jurisdiction conferred by a special jurisdictional act. In each case the treaty, agreement or statute involved provided for interest on the price paid. In no case did Congress expressly allow or even consider the allowance of interest on the additional sum awarded long after the original transaction had been closed which means that the differing results cannot be predicated on congressional intent.

A case of particular interest is *Menominee Tribe* v. *United States*.[27] In that case one statute called for the sale of timber belonging to the Indians, the proceeds to be deposited in the Treasury at 5% interest. Another statute called for Government operation of a sawmill, the

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[26] Note 19 above.

[27] 107 Ct.Cl. 23 (1946).

net proceeds to be deposited in the Treasury at 4% interest. The Government sold the timber and operated the sawmill, and paid interest on the proceeds once they were deposited into the Treasury. But the Indians claimed the Government had not promptly deposited the proceeds, and claimed interest on the proceeds during the periods of delay. The Court held that Congress did not intend for interest to begin until the proceeds were deposited in the Treasury, but held also that there was an implied agreement [28] to deposit the proceeds promptly, and that interest would begin running as soon as the proceeds could have been deposited by the exercise of reasonable diligence.

It would seem that if the statute in *Menominee* is read to call for interest as if deposits had been promptly made, the Agreement in the instant case should be read to call for interest as if payment had been adequately made. Indeed, the latter is exactly what this Court held in *Blackfeather*, and the Court of Claims held in *Mille Lac*.

Generally, of course, interest is not allowable on Indian claims [29] unless the claim arises from a "taking" under the Fifth Amendment,[30] or unless a treaty, statute or contract expressly (or impliedly) provides for interest.[31] The question we raise (interest on additional compensation where the initial compensation was expressly entitled to interest) may seem narrow, yet it has been litigated several times in the past, as cited above,[32] with

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[28] Id. at 32.

[29] *United States* v. *Alcea Band*, 341 U.S. 48, 49 (1951).

[30] *United States* v. *Creek Nation*, 295 U.S. 103 (1935); *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937).

[31] *United States* v. *Blackfeather*, 155 U.S. 180 (1894); *Menominee Tribe* v. *United States*, 107 Ct.Cl. 23 (1946).

[32] For example, *Blackfeather*, note 19 above; *Mille Lac*, note 22 above; *Peoria*, note 24 above; and, of course, the instant case.

conflicting results. The question will be litigated in the future.[33] A modern decision by this Court, reaffirming *Blackfeather* and the extra duty of fairness on the part in dealing with its Indian wards,[34] is needed in order to dispel the confusion caused by conflicting decisions in the Court of Claims.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[33] For example, the same issue as now raised is pending in *Klamath Tribe* v. *United States*, Docket 100A, now pending before the Indian Claims Commission. See Plaintiffs' Proposed Findings in that case, April 15, 1964.

[34] A duty recognized by this Court from *Worcester* v. *Georgia*, 31 U.S. (6 Pet.), 515, 582 (1832) to *Squire* v. *Capoeman*, 351 U.S. 1, 7 (1956), and by Congress from the Northwest Ordinance of 1789, 1 Stat. 51n, Art. III ("the utmost good faith shall always be observed toward the Indians") to the Indian Claims Commission Act, 25 U.S.C. § 70.

APPENDIX A

OPINION AND JUDGMENT BELOW IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 5-64

(Decided July 15, 1966)

NEZ PERCE TRIBE OF INDIANS

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS and COLLINS, *Judges*.

OPINION

LARAMORE, *Judge*, delivered the opinion of the court:

In this case the Nez Perce Tribe of Indians appeals from a decision of the Indian Claims Commission [1] that it is not entitled to a recovery under sectin 2, clauses (3) and (5) of the Indian Claims Commission Act.[2]

[1] 13 Ind. Cl. Comm. 184 (April 7, 1964).

[2] 60 Stat. 1049, 1050 (1946). Clauses (3) and (5) of section 2 provide: "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe * * *: (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, [or] unconscionable consideration * * *; (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."

Appellant claims additional compensation for the reservation lands which it ceded to the United States by the Agreement of May 1, 1893, ratified August 15, 1894, 28 Stat. 286, 326-332. Prior to the Agreement, appellant owned a treaty reservation [3] in northern Idaho which contained some 762,000 acres. Under the Agreement, part of the reservation was allotted to individual Indians and to the Tribe for trust lands. The remaining land, comprising 549,559 acres was ceded to the appellee for a purchase price of $2.97 per acre. The appellant contended before the Commission that the ceded lands had a fair market value of $12.63 per acre on August 15, 1894, the agreed valuation date. The appellee argued that the evidence supported a value of $1.29 per acre. The Commission indicated that the evidence would support a value of $4 per acre as a maximum,[4] but decided that the $2.97 per acre which the appellant received was not sufficiently less than the maximum $4 value to be considered "unconscionable." In addition, the Commission concluded that appellant had not succeeded in establishing that there was any fraud or duress or unfair and dishonorable dealing in connection with the negotiations and execution of the Agreement. In a concurring opinion, Commissioner Scott wrote that he personally found the discrepancy unconscionable, particularly viewed in gross—*i.e.*, the $1.03 difference multiplied by the 549,559 acres involved amounts to $566,045.77. However, he felt bound by precedents indicating that the discrepancy must be "very gross." [5] We

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[3] In a treaty dated June 11, 1855 and ratified on March 8, 1859, a reservation of roughly seven million acres was set aside for the Nez Perce Tribe. 12 Stat. 957-962. The lands in controversy are part of that original reservation.

[4] 13 Ind. Cl. Comm., at 264.

[5] *E.g., Otoe and Missouria Tribe of Indians* v. *United States*, 131 Ct. Cl. 593, 131 F. Supp. 265, *cert. denied*, 350 U.S. 848 (1955); *Osage Nation of Indians* v. *United States*, 119 Ct. Cl. 592, 97 F. Supp. 381, *cert. denied*, 342 U.S. 896 (1951).

are of the view that there is substantial evidence in the record indicating a value of $4 per acre, but unlike the Commission, we think this is a minimum figure. We agree with the Commission that the appellant has not shown fraud or duress or that the dealings were other than "fair and honorable." We disagree, however, with the Commission's view of the law of unconscionable consideration and, accordingly reverse and remand the case for further proceedings.

By way of background, the Nez Perce Tribe in 1855 ceded to the United States a tremendous area in the Territory of Washington which then included what is now part of the present State of Washington and northern Idaho. This agreement or treaty was ratified in 1859. 12 Stat. 957. In its Article II, the agreement provided for a large reservation, a portion of which was later ceded in 1894 and is involved here. The relevant portion of the 1859 reservation was located in northern Idaho just east of Lewiston. The area consisted mainly of a high and gently undulating plateau cut into blocks by canyons. The rainfall, climate, and soils, were generally favorable for the raising of cereal crops, especially wheat. The area was an extension of the Palouse country and had similar soils. Slightly over one-half of the ceded area had a highest and best use for agriculture. Somewhat less than one-quarter of the ceded area had a highest and best use as timberland. These areas contained a good commercial grade of timber for which there was an expanding local market. The remaining land was classified as range land and was well-suited for livestock grazing.

By 1894, the Lewiston area was fairly well-settled and growing. The city itself was founded in 1861 at the confluence of the Snake and Clearwater Rivers, the latter running through the northern part of the reservation. It was the first capital of the Idaho territory and by 1867 was the population center of the Walla Walla Valley.

In 1890, the neighboring counties to the reservation had substantial amounts of acreage under cultivation. Thus, Nez Perce, Shoshone, and Idaho counties reported 48,339 cultivated acres; the figure for Whitman, Garfield, Columbia, and Asotin counties was 237,558 acres. This indicates that both the market (presumably in Lewiston) and transportation facilities adequately served the area. The Clearwater River was navigable for river transportation for a short distance into the subject area. Rail transportation was available a short distance outside, to the north. There were also wagon trails across the reservation.

The 1893 Agreement gave the Indians first choice through the allotment provision. These allotments, totaling 180,657 acres, were generally scattered throughout the reservation excepting some concentration around the existing Indian settlements in the northwest section of the ceded area. The soil and topographical maps suggest that the Indians chose wisely. About two-thirds of the lands selected by them were in the most favorable land classification. Their selection of the lands in the northwest section might be explained by their proximity to Lewiston and better river transportation. Their selection of the most northwestern plateau lands above the Clearwater River is probably best explained by the fact that the Palouse soil area (apparently the best wheat-growing area) continues south to this plateau and the railroad is closest to this area.

The unallotted or ceded lands were opened to the public on November 18, 1895, and the best lands were taken very quickly. There were 507 homestead filings in the first 13 days following the reservation's opening. The Agreement of 1893 and the proclamation opening the lands to settlement provided that settlers pay $3.75 per acre for agricultural lands and $5 per acre for stone, timber and mineral lands. 28 Stat. 326, 332. During the first five years 68 percent of the land was taken, and

by 1905, 10 years after the lands had been opened, 87 percent was taken. A total of 449,160 acres was acquired free under the homestead laws; 14,800 agricultural acres were bought for the statutory $3.75 per acre; 9,320 timber acres were bought for the statutory $5 per acre; 27,200 acres were reserved for state schools; 7,880 acres were retained by the United States for public use or leased for grazing; 4,240 acres were placed in public water reserve; and the remaining 36,400 acres were reserved for miscellaneous uses such as for churches and power sites.

The picture we get, in summary, is that of a large tract of virgin land (about 850 square miles) adaptable to varied uses, the 1894 market value of which was necessarily lowered by its sheer size, the necessity of substantial development expenditures, and its lesser degree of accessibility to markets than other nearby areas. In addition to these negatives, there was the supply and demand factor as such; that is to say, the northern Idaho area, although no doubt relatively populous for a new territory, simply did not have the kind of population growth that exerts a real inflationary bias on land values. Whatever pressure there was to settle new land, and there obviously was some pressure as the very fact of the Nez Perce cession suggests, it was probably deferrable. It is significant to note in this connection that the 1894 valuation date falls at the low point of the so-called "Cleveland Depression." Farm product prices were markedly affected during this period, so it is reasonable to assume that land values were diminished as well. Such generalities, of course, do not give the answer to the question of fact we must resolve; they are at best common sense guidelines, useful in viewing the evidence to determine whether the value of the cession in 1894 was closer to $4 per acre than it was to $12 per acre.

The principal evidence on valuation is contained in the two appraisal reports and the testimony of the parties' expert witnesses. Appellant relies on the testimony of

William C. Brown, appellee on the testimony of Homer Hoyt. Both appraisers arrived at their ultimate value figures ($11.89 per acre for Brown; $1.29 per acre for Hoyt) primarily by looking to so-called "comparable sales." In addition, they looked to the topography, soil conditions, transportation availability—to name a few other factors—and have supplied us with a substantial record of maps, photographs, and charts to buttress their conclusions. In evaluating this volume of material, the Commission concentrated on the "comparable sales" in areas proximate to the reservation, and struck a balance between what it considered to be the extreme positions of the experts. Thus, the Commission observed that appellant's expert Brown looked to many land transactions with prices exceeding $20 per acre which occurred in well-settled areas where the land was frequently of better quality, transportation was superior, and rainfall was more plentiful. In addition, it noted that many of the sales were of farms which were improved—*i.e.*, with fences, buildings, watering facilities—and which had been settled for some years before the valuation date. So it concluded, as did Brown, that these sales would have to be discounted to make them "comparable" to the reservation land. Brown used a 20 percent discount; the Commission obviously used something greater. On the other hand, the Commission observed that appellee's expert, Hoyt, considered many less sales in his analysis and in many instances looked to distant lands not in any way comparable to the ceded lands. The Commission, in effect, concluded that Hoyt over-discounted the value of the lands which both he and Brown considered, and improperly considered lands beyond the zone of even bare comparability.

We agree with the Commission that Brown was overly optimistic and Hoyt overly pessimistic. We are also in accord with the Commission's apparent inclination toward Brown's basic method. However, in concluding that the

evidence shows that the land was worth a minimum and not a maximum of $4 per acre, we have viewed the evidence, and particularly the appraisal method used by Brown, somewhat differently from the Commission. Brown's report shows the average sales price of agricultural lands in the counties in which parts of the ceded tract were located ("tract counties") to be $15.70 per acre. This was the result of the investigation of 174 sales covering 38,335 acres. Timberland sales averaged $13.38 per acre in these counties and range land $4.54 per acre. For so-called "comparable counties"—*i.e.*, counties neighboring the counties in which parts of the reservation were located—Brown found sales price averages to be somewhat lower than in the tract counties. Averaging the tract county and comparable county figures, he determined that agricultural land in the tract area in 1894 was worth $15.42 per acre, timberland $13.01 per acre, and range land $4.11 per acre. He multiplied these averages by the tract acreage in each of these categories to arrive at a value for the entire half-million acres of $11.89 per acre.

In computing the average sales price figures in the first step above, Brown applied a 20 percent discount to the actual sales price. Stated differently, he discounted the $19.80 per acre average sales price of tract and comparable county agricultural land to $15.42. This discount he felt was necessary to reflect the fact that the $19.80 per acre average included improvements to the land and improvements on the land, *e.g.*, the value of buildings and fixtures, plowing, watering facilities and fencing. In addition, he applied a scale of discounts to arrive at the $19.80, these discounts to take into account the purchasing power of the dollar in the area (*i.e.*, the price index from 1890-1900). We have no quarrel with the latter discounts. We do think, however, that the 20 percent discount may be unrealistically low. Brown went to great effort to document his 20 percent figure, and perhaps so

far as it goes it is accurate. We think it should be expanded to cover not just the value of the improvements to the "comparable" land, but also to cover the "real" cost of improving the ceded land. This broadens the concept of discount to make the comparison to the tract county and comparable county lands more meaningful. The topography alone suggests there were substantial barriers to bringing in the labor and material necessary to improve the land to the degree that land was improved on the Palouse plateau which was nearer the railroads and population "centers." While we cannot supply a precise figure for the proper discount, we think something in the range of 25 percent may better take into account the premium which "improved" land in the other areas could have commanded over the ceded lands.

In addition to the improvement discount, we think the land values in other areas, if they are to be used as the guide here, should be futher discounted to take account of the remoteness of the ceded land. Brown made no such discount. Granting that a railroad came within two miles of the northern boundary and that the Clearwater River was regularly navigable at least for a few miles in the northwest part, the topography was such that transportation of wheat, hay, or timber would have been readily accessible in a relatively limited part of the ceded area, and the allotment map suggests that the Indians chose the prime land in the most accessible areas. Accordingly, we feel that a purchaser of the ceded area would have expected to pay some percent less than the price he would have expected to pay for land on the Palouse plateau or near the Snake River, for example—both being areas considered as comparable by Brown. This might have been 20 to 25 percent.

Finally, we note regarding Brown's method, that he made no discount for size. We think this is an extremely important feature entering into market value. A pur-

chaser of over one-half million acres simply would not pay what 1,000 purchasers of 500 acres each would be willing to pay. Of course, the Indians were in a sense compelled to cede the land, while they might have preferred to sell it piecemeal over a number of years to the hypothetical 1,000 purchasers of 500 acres each. So we are loath to allow the government to get a bargain because it compelled the Indians to cede the land. It is simply the fact, however, that in buying such a large, undeveloped tract, the government undertook the project of dividing and selling the land. *Cf. Miami Tribe of Oklahoma* v. *United States*, 9 Ind. Cl. Comm. 1, 17 (1960), *aff'd by order*, 159 Ct. Cl. 593 (1962). These are expenses the Indians were saved by selling the land as a unit. In addition, by buying the land and holding it pending disposition, the government lost the interest on the amount of the purchase price for the period prior to resale. Any purchaser of a large tract necessarily must take account of the "interest cost" of holding land pending resale. How much of a discount is warranted by the size it is difficult to say. We think, however, that something in the range of 20-25 percent might be reasonable.

By adding together a 25 percent discount for improvements, a 20-25 percent discount for remoteness and inaccessibility, a 20-25 percent discount for size, and applying this to Brown's "comparable" sales, it is possible to come up with a figure fairly close to $4—*i.e.*, $20 per acre less 65 to 75 percent equals $5 to $7. This is, of course, the roughest form of estimating. We do not suggest that these discounts either were used by the Commission or should have been. We do not know how it arrived at the conclusion that "a figure as high as $4.00 per acre might be indicated * * * [,] [b]ut in no event * * * could [it] have exceeded $4.00 per acre." In our review of the opinion, findings of fact, and record to determine whether there is substantial evidence to support a $4 figure, we have had to consider what the Commission might have

had in mind. We think the discounts, which of course can be conveniently altered to produce a wide spectrum of possible values, are a reasonable approximation of what the Commission did. It should be clear, however, that the discounts we have said might be within a range of reasonableness are in no sense absolutes; they are but steps in analyzing the reasonableness of the Commission's conclusion in the light of the evidence. Property appraisal is an inexact science at best; this is particularly so when the valuation date is 70 years distant from the appraisal date. So any discounts other than those which can be documented (*e.g.*, Brown's 20 percent discount for improvements) will necessarily be left to conjecture—the reasonableness of which is largely a matter of common sense.

To reiterate, we think that the $4 per acre figure is supported by substantial evidence. It is, however, at the threshold, and not at the ceiling as the Commission determined. We think the overwhelming weight of the evidence shows that the Commission should have found the $4 figure to be the minimum. In so concluding, we have considered the Brown and Hoyt comparable sales analyses, giving more weight to Brown's. Since none of the sales were strictly comparable, we have looked to the discounting methods which were used by the appraisers implicitly or explicitly to make the other sales comparable. To Brown's method of discounting improvements we have added additional discounts for remoteness and size. Also in our thinking has been the effect of the 1894 depression on property values and the effect of the allotments. Finally, we have thought it significant that the 1894 Treaty provided for a sales price of $3.75 per acre for agricultural land and $5 per acre for timberland, and a substantial amount of acreage was bought by settlers after 1894 at these prices. No doubt the government would be entitled to some premium over its purchase price

($2.97 per acre here), but the very size of the premium here suggests that the bargain was too good.

The question then arises as to whether the difference between the $2.97 per acre paid to the Indians and the $4 per acre minimum value is sufficiently large as to be unconscionable under section 2 of the Indian Claims Commission Act. 60 Stat. 1049, 1050. In *Osage Nation* v. *United States*, 1 Ind. Cl. Comm. 43 (1948), the Commission was called upon to define "unconscionable consideration" as used in the Act. It concluded that the dividing line between what is grossly inadequate consideration and what is merely inadequate was a peculiarly factual question. In affirming the Commission's approach, this court wrote:

> Appellants urge that no showing of actual fraud is required for relief on the grounds of unconscionable consideration. There are cases which seem to support both views, but it appears that only where the inequality of the bargain is very gross, does disparity of price alone justify a conclusion that the consideration was unconscionable. *As to what is "very gross," the courts have provided no exact formula and each case must be carefully considered on its own particular facts and circumstances.* [Emphasis added.] [119 Ct. Cl. 592, 666, 97 F. Supp. 381, 421, *cert. denied*, 342 U.S. 896 (1951).]

The "facts and circumstances" inquiry has always been crucial in each case, and there is no ready-made test. Thus, although this court's cases holding that a particular consideration was unconscionable have involved discrepancies of over 100 percent (the percentage difference between the actual value and the amount paid), there has been no indication that lesser percentage discrepancies are exempt from the challenge of unconscionability. See *Sac and Fox Tribe of Indians of Oklahoma* v. *United States*, 167 Ct. Cl. 710, 340 F. 2d 368 (1964), *Otoe and Missouria Tribe* v. *United States*, 131 Ct. Cl. 593, 131

F. Supp. 265, *cert. denied*, 350 U.S. 848 (1955); *Osage Nation of Indians* v. *United States*, *supra*. The Commission has, however, taken the strict view that discrepancies considerably less than 100 percent are not unconscionable. In *Miami Tribe* v. *United States*, 6 Ind. Cl. Comm. 513 (1958),[6] it held that payment of 63 percent (a 59 percent discrepancy) of the true value was not unconscionable. In the present case it has held that a payment of 75 percent (a 33⅓ percent discrepancy) is not unconscionable. See also *Pottawatomie Tribe* v. *United States*, 3 Ind. Cl. Comm. 10, 61 (1954). We think that the Commission has relied too much on the bare percentage discrepancy.

In the present case, inquiry into all the "facts and circumstances" puts the situation in a somewhat different light. Specifically, it is significant to us that the ceded area was comprised of 549,559 acres. The $1.03 difference between the amount paid and the market value multiplied by this acreage totals $566,045.77. Granting that this represents the same 33⅓ percent discrepancy, it has a different taste. Half a million dollars in 1894 was a very substantial sum. When we consider that the Agreement provided that $1,000,000 of the total $1,626,222 consideration was to be put in trust to earn five percent interest and that it is likely that the $566,045.77 discrepancy would have similarly been put in trust at interest, the discrepancy becomes still more significant. The trust provided that a $50,000 distribution would be made one year after ratification with semi-annual $150,000 distributions thereafter—five percent interest to accrue on the unpaid balance. Agreement of May 1, 1893, Arti-

[6] When the decision was appealed, this court found that the Commission had erred in determining the amount of the consideration which the Miami Tribe received for its lands and that this figure amounted to only 38 percent of the true value. 150 Ct. Cl. 725 (1960), *cert. denied*, 366 U.S. 924 (1961). Thus, the court did not reach the question whether payment of 63 percent of value was adequate *per se*.

cle III, 28 Stat. 326, 329. Assuming that the $566,045.77 discrepancy had been put into the trust in 1894, no part of it would have been distributed for about five years, and then it would have taken two years to distribute the corpus alone. As a very rough estimate, the interest would have been close to $200,000 for the duration that the discrepancy hypothetically would have been held in trust. When added to the $566,045.77 discrepancy, this interest component raises the percentage discrepancy from 33⅓ percent to about 50 percent.

For purposes of judging whether the consideration was unconscionable, it is also significant that the $4 per acre figure which produces the $566,045.77 discrepancy is a bare minimum. It should be clear from our discussion on the valuation aspect that we think the evidence would support a higher value. Accordingly, although we do not remand the case to the Commission with express instructions to find a higher value, we do feel that it is appropriate to look to some higher, unstated value in resolving the "unconscionable consideration" issue. No doubt the reason for the Commission's view that the percentage discrepancy is of cardinal importance is that it is impossible to determine a "true" value for land. It is just common sense that some discrepancy, very possibly up to 33⅓ percent, can be expected to result simply from differences in opinion. However, the present case is not the usual situation because we have eliminated one aspect that is typically present in situations in which there are legitimate differences of opinion. This point may be developed by reference to the facts in the present case. The Indians received $2.97 per acre and the land was worth $4 at the very least. Were this a normal real property transaction between a willing buyer and seller, this discrepancy could be explained as resulting from a legitimate difference of opinion or as a good bargain for the buyer and a bad bargain for the seller, but in no sense as an unfair bargain. By concluding that the $4 per acre figure

is a bare minimum, however, we have eliminated the aspect of the "legitimate" margin between $2.97 and $4 per acre. That is to say, we believe that no reasonable seller in a willing transaction under any circumstances would have parted with ownership of the ceded area for less than $4 per acre. So on the facts of this case, the "legitimate" margin is not between $2.97 and $4, but between $4 and something greater.

At the risk of being repetitious, we stress that the percentage discrepancy between what the Indians were paid and what the land was worth is not the sole measure of unconscionable consideration. We also stress that we do not depart from our prior position that the price disparity must be "very gross." We think we are giving effect to both the percentage test and the "very gross" test (which should be substantially identical) in looking to the total discrepancy, to the interest factor, and most importantly to the fact that the $4 per acre value is a bare minimum.

There remains the question of whether the appellant is entitled to interest on its recovery.[7] Appellant now seeks interest on the theory that if the United States had paid an amount equal to the fair market value of the land at the time of the cession, this additional sum would have drawn interest in the same manner and at the same rate as provided for the $1,000,000 held in trust under the Agreement's Article III. 28 Stat. 326, 329. It is, of course, well established that interest does not run on claims against the United States, unless there is an express statutory or contract provision to the contrary or unless there is a showing of delay in payment for lands "taken" in contravention of the Fifth Amendment. 28 U.S.C. § 2516(a) (1964 Ed.). *United States* v. *Alcea*

[7] No mention was made of interest in the petition before the Indian Claims Commission. Appellant says, however, that it did assert the claim at the beginning of trial, and all parties have been fully aware of the issue since then.

Band of Tillamooks, 341 U.S. 48, 49 (1951); *United States* v. *Thayer-West Point Hotel*, 329 U.S. 585, 588 (1947); *Cf.*, *Confederated Salish and Kootenai Tribes* v. *United States*, Ct. Cl. No. 50233, decided May 13, 1966. Thus appellant's burden here is to show that the Agreement as ratified would have given it five percent interest on the differential amount had it been paid to the trust in 1894. The Agreement is quite specific. Article III, *supra*, provides that the Nez Perce Indians shall be paid $1,626,222 exactly; the $626,222 portion to be paid "to said Indians per capita as soon as practicable after the ratification of this Agreement," the "remainder of said sum" (equalling $1,000,000) to be held in trust. Earlier in this opinion, we speculated that had the government paid the fair market value in 1894, it probably would have agreed to hold the extra money in trust in the same manner as the $1,000,000. However, that speculation was appropriate only as it related to the question of whether the consideration was unconscionable. In determining whether the Agreement should be read so as to give appellant interest on the difference between the price paid and the fair market value, it is not enough for us to be able to say that *probably* a larger payment would have been put into the trust. Article III did not make the trust open-ended. It was to receive "the remainder" of a specific sum. What would have happened had the sum been larger it is impossible for us to say. This is not a case like the *Pawnee Tribe* v. *United States*, 56 Ct. Cl. 1, 15 (1920), in which this court awarded interest on an amount which the agreement specified but which the United States had for some unknown reason never paid. 27 Stat. 612, 644. The Agreement here specified a sum to bear interest, and that sum apparently was paid and did bear interest; the sum claimed here is over and above the amount specified in the Agreement. In short, the Agreement has reference only to the amount that was actually agreed upon and gives no warrant for reading

in a requirement that any sum determined in the future to be the fair market value should bear interest.

Accordingly, the decision of the Indian Claims Commission is reversed, and the case is remanded for further proceedings in conformity with this opinion.

Reversed and *remanded.*

APPENDIX B

AGREEMENT WITH THE NEZ PERCE INDIANS IN IDAHO.
(28 Stat. 286, 326-332)

SEC. 16. Whereas Robert Schleicher, James F. Allen, and Cyrus Beede, duly appointed commissioners on the part of the United States, did on the first day of May, eighteen hundred and ninety-three, conclude an agreement with the principal men and other male adults of the Nez Perce tribe of Indians upon the Lapwai Reservation, in the State of Idaho, which said agreement is as follows:

Whereas the President, under date of October thirty-first, eighteen hundred and ninety-two, and under the provisions of the Act of Congress entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," approved February eighth, eighteen hundred and eighty-seven, authorized negotiations with the Nez Perce Indians in Idaho for the cession of their surplus land; and

Whereas the said Nez Perce Indians are willing to dispose of a portion of the tract of land in the State of Idaho reserved as a home for their use and occupation by the second article of the treaty between said Indians and the United States, concluded June ninth, eighteen hundred and sixty-three:

Now, therefore, this agreement made and entered into in pursuance of the provisions of said act of Congress approved February eighth, eighteen hundred and eighty-seven, at the Nez Perce Agency, by Robert Schleicher, James F. Allen, and Cyrus Beede, on the part of the United States, and the principal men and male adults of the Nez Perce tribe of Indians located on said Nez Perce Reservation, witnesseth:

ARTICLE I.

The said Nez Perce Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of said reservation, saving and excepting the following described tracts of lands, which are hereby retained by the said Indians, viz:

[Voluminous detailed description of land omitted.]

ARTICLE II.

It is also stipulated and agreed that the place known as "the boom" on the Clearwater River, near the mouth of Lapwai Creek, shall be excepted from this cession and reserved for the common use of the tribe, with full right of access thereto, and that the tract of land adjoining said boom, now occupied by James Moses, shall be allotted to him in such manner as not to interfere with such right. Also, that there shall be reserved from said cession the land described as follows: "Commencing at a point at the margin of Clearwater River, on the south side thereof, which is three hundred yards below where the middle thread of Lapwai Creek empties into said river; run thence up the margin of said Clearwater River at low-water mark, nine hundred yards to a point; run thence south two hundred and fifty yards to a point; thence southwesterly, in a line to the southeast corner of a stone building, partly finished as a church; thence west three hundred yards to a point; thence from said point northerly in a straight line to the point of beginning; and also the adjoining tract of land lying southerly of said tract, on the south end thereof; commencing at the said corner of said church, and at the point three hundred yards west thereof, and run a line from each of said points. One of said lines running on the east side and the other on the west of said Lapwai Creek; along the foothills of each

side of said creek; up the same sufficiently far so that a line being drawn east and west to intersect the aforesaid lines shall embrace within its boundaries, together with the first above described tract of land, a sufficient quantity of land as to include and comprise six hundred and forty acres;" for which described tracts of land the United States stipulates and agrees to pay to William G. Langford, his heirs or assigns, the sum of twenty thousand dollars, upon the execution by said Langford, his heirs or assigns, of a release and relinquishment to the United States of all right, title, interest, or claim, either legal or equitable, in and to said tracts of land, derived by virtue of a quit-claim deed of February fourteenth, eighteen hundred and sixty-eight, to the said William G. Langford, from Langdon S. Ward, treasurer of the American Board of Commissioners for Foreign Missions; which release and relinquishment shall be satisfactory to the Secretary of the Interior, and it is stipulated and agreed by said Nez Perce Indians that upon the execution and approval of such release and relinquishment the right of occupancy of said Indians in said described tracts shall terminate and cease and the complete title thereto immediately vest in the United States: *Provided*, That any member of the said Nez Perce tribe of Indians entitled to an allotment now occupying and having valuable improvements upon any of said lands not already occupied or improved by the United States may have the same allotted to him in such subdivisions as shall be prescribed and approved by the Secretary of the Interior, in lieu of an equal quantity of agricultural land allotted to him elsewhere; and for this purpose shall relinquish any patent that may have been issued to him before the title to said "Langford" tracts of land shall vest in the United States, and shall have a new patent issued to him of the form and legal effect prescribed by the fifth section of the act of February eighth, eighteen hundred and eighty-seven (twenty-fourth Statutes, three

hundred and eighty-eight), covering the new allotment and that portion of the former allotment not surrendered. It is further agreed that five acres of said tract, upon which the Indian Presbyterian Church is located, as long as same shall remain a church, shall be patented to the trustees of said church; that the said five acres shall not include improvements made by the United States; the said five acres to be selected under the direction of the Commissioner of Indian Affairs.

ARTICLE III.

In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid the United States stipulates and agrees to pay to the said Nez Perce Indians the sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars, of which amount the sum of six hundred and twenty-six thousand two hundred and twenty-two dollars shall be paid to said Indians per capita as soon as practicable after the ratification of this agreement. The remainder of said sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars shall be deposited in the Treasury of the United States to the credit of the "Nes Perces Indians, of Idaho," and shall bear interest at the rate of five per centum per annum, which principal and interest shall be paid to said Indians per capita as follows, to wit: At the expiration of one year from the date of the ratification of this agreement the sum of fifty thousand dollars, and semi-annually thereafter the sum of one hundred and fifty thousand dollars with the interest on the unexpended portion of the fund of one million dollars until the entire amount shall have been paid, and no part of the funds to be derived from the cession of lands by this agreement made shall be diverted or withheld from the disposition made by this article on account of any depredation or other act committed by any Nez Perce Indian, prior to the execution of this agreement, but the

same shall be actually paid to the Indians in cash, in the manner and at the times as herein stipulated.

ARTICLE IV.

It is further stipulated and agreed that the United States will purchase for the use of said Nez Perce Indians two portable steam saw mills, at a cost not exceeding ten thousand dollars, and will provide for said Indians, for a period not exceeding two years, and at a cost not exceeding twenty-four hundred dollars, a competent surveyor, for the purpose of fully informing said Indians as to the correct locations of their allotments and the corners and lines thereof.

ARTICLE V.

It is further stipulated and agreed that the lands by this agreement ceded, shall not be opened for public settlement until trust patents for the allotted lands shall have been duly issued and recorded, and the first payment shall have been made to said Indians.

ARTICLE VI.

It is further stipulated and agreed that any religious society or other organization now occupying under proper authority, for religious or educational work among the Indians, any of the lands ceded, shall have the right for two years from the date of the ratification of this agreement, within which to purchase the land so occupied, at the rate of three dollars per acre, the same to be conveyed to such society or organization by patent, in the usual form.

ARTICLE VII.

It is further stipulated and agreed that all allotments made to members of the tribe who have died since the same were made, or may die before the ratification of

this agreement, shall be confirmed, and trust patents issued in the names of such allottees, respectively.

ARTICLE VIII.

It is further stipulated and agreed that the first per capita payment, provided for in Article VIII of this agreement, shall be made to those members of the Nez Perce tribe whose names appear on the schedule of allotments made by Special Agent Fletcher, and to such as may be born to them before the ratification of this agreement: *Provided*, That should it be found that any member of the tribe has been omitted from said schedule, such member shall share in the said payment, and shall be given an allotment, and each subsequent payment shall be made to those who receive the preceding payment and those born thereafter: *Provided*, That not more than one payment shall be made on account of a deceased member.

ARTICLE IX.

It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians shall be subject, for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians.

ARTICLE X.

Representation having been made by the Indians in council that several members of the Nez Perce tribe, to the number of about fifty, as per list hereto attached, served the United States under General O. O. Howard, in the late war with Joseph's Band of said tribe, as

scouts, couriers, and messengers, and that they have received no pay therefor; it is agreed that the United States, through its properly constituted authority, will carefully examine each of the cases herewith presented, and make such remuneration to each of said claimants as shall, upon such examination, be found to be due; not exceeding the sum of two dollars and fifty cents per day each, for the time actually engaged in such service; it being understood and agreed that the time of service of said claimants in no case exceeded sixty days. And it also having been made to appear that Abraham Brooks, a member of the Nez Perce tribe of Indians, was engaged in the service of the United States in the late war with Joseph's Band of Nez Perces, and it also appearing that the said Abraham Brooks was wounded in said service, and that by reason thereof he is now in failing health, and has been for several years; that he is now nearly blind in consequence thereof; it is agreed that an investigation of all the facts in the case shall be made by the proper authorities of the United States, as early as practicable, and that if found substantially as herein represented, or if found worthy under the law in such cases provided, he shall be allowed and paid by the United States a pension adequate to the service and disability.

ARTICLE XI.

The existing provisions of all former treaties with said Nez Perce Indians not inconsistent with the provisions of this agreement are hereby continued in full force and effect.

ARTICLE XII.

This agreement shall not take effect and be in force until ratified by the Congress of the United States.

In witness whereof the said Robert Schleicher, James F. Allen, and Cyrus Beede, on the part of the United

States, and the principal men and other male adults of the Nez Perce tribe of Indians, have hereunto set their hands.

Concluded at the Nez Perce Agency, this first day of May, anno domini eighteen hundred and ninety-three.

ROBERT SCHLEICHER,
JAMES F. ALLEN,
CYRUS BEEDE,
A. B. LAWYER; and others.

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said agreement be, and the same hereby is, accepted, ratified, and confirmed.

That for the purpose of carrying the provisions of this Act into effect there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one million six hundred and sixty-eight thousand six hundred and twenty-two dollars, of which amount the sum of one million dollars shall be placed to the credit of "the Nez Perce Indians of Idaho" in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum. Said sum of one million six hundred and sixty-eight thousand six hundred and twenty-two dollars, together with the interest on said sum of one million dollars, shall be paid to said Indians, or expended for their benefit, as provided in articles two, three, four, and eight of said agreement; "out of which sum the Secretary of the Interior shall pay to the heirs, administrator, or legal representatives of William G. Langford, deceased, the sum of twenty thousand dollars, upon a release and relinquishment to the United States by said heirs, administrator, or legal representatives of all right, title, interest, or claim, either legal or equitable, in and to the tract of land described in article two of said agreement as therein provided: *Provided*, That none of the money agreed to be paid said Indians, nor any of the interest thereon, shall be, or become, liable to the payment of any judgment or claim for depredations committed by said tribe or any member thereof before the date of said agreement.

That immediately after the issuance and receipt by the Indians of trust patents for the allotted lands, as provided for in said agreement, the lands so ceded, sold, relinquished, and conveyed to the United States shall be

opened to settlement by proclamation of the President, and shall be subject to disposal only under the homestead, town site, stone and timber, and mining laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and be subject to the laws of Idaho: *Provided*, That each settler on said lands shall, before making final proof and receiving a certificate of entry, pay to the United States for the lands so taken by him, in addition to the fees provided by law, the sum of three dollars and seventy-five cents per acre for agricultural lands, one-half of which shall be paid within three years from the date of original entry; and the sum of five dollars per acre for stone, timber, and mineral lands, subject to the regulations prescribed by existing laws; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to the sum to be paid as aforesaid.

That the Commissioner of Indian Affairs be, and he hereby is, authorized to employ a competent surveyor for a period not exceeding two years, at a compensation not exceeding one thousand two hundred dollars per annum, for the purposes stipulated in article four of said agreement, and he is also authorized to purchase two portable sawmills, as provided in article four.

That the Secretary of the Interior is hereby authorized to examine the claim of those Indians who served the United States under General O. O. Howard in the late war with Joseph's band of said tribe as scouts, couriers, and messengers, referred to in article ten of said agreement, and also as to the claim of Abraham Brooks, mentioned in said article, and report his findings and recommendations to Congress.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1041

NEZ PERCE TRIBE OF INDIANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of a determination of the Court of Claims (Pet. App. 13–28) concerning one of the provisions of an 1893 Agreement (Appendix, *infra,* pp. 5–6) in which petitioner ceded certain tribal land to the United States. The court below remanded to the Indian Claims Commission petitioner's claim that the consideration paid under the 1893 Agreement was "unconscionable" (see Section 2, Indian Claims Commission Act, 25 U.S.C. 70a) for determination under guidelines set forth in the court's opinion. The Court of Claims went on to state that, under Article III of the Agreement, there was no basis for recovery of interest on any additional sum for the land that might be awarded to petitioner.

248-574—67

Whether there was, in fact, an unconscionable difference in the consideration paid by the United States for the land and its fair market value has not yet been determined.

With respect to the issue of interest, which petitioner seeks to have reviewed, the Court of Claims stated (Pet. App. 26–28):

> It is, of course, well established that interest does not run on claims against the United States unless there is an express statutory or contract provision to the contrary or unless there is a showing of delay in payment for lands 'taken' in contravention of the Fifth Amendment. * * * The Agreement here specified a sum to bear interest, and that sum apparently was paid and did bear interest; the sum claimed here is over and above the amount specified in the Agreement. In short, the Agreement has reference only to the amount that was actually agreed upon and gives no warrant for reading in a requirement that any sum determined in the future to be the fair market value should bear interest.

1. The decision of the Court of Claims—that interest may not be recovered under Article III of the agreement—is plainly correct. There is no reason for this Court to review the construction of one of the specific terms of the articles of the particular Agreement. This Court and the Court of Claims have long adhered to the traditional rule that interest on claims against the United States cannot be recovered, absent express congressional direction to the contrary. See, *e.g.*, *United States* v. *Tillamooks*, 341

U.S. 48; *Confederated Salish and Kootenai Tribes* v. *United States,* 175 Ct. Cl. 451, certiorari denied, 385 U.S. 921. The only exception to the rule is when the taking entitles the claimant to just compensation under the Fifth Amendment. *United States* v. *Tillamooks, supra,* at 49. Since the Agreement does not provide for the payment of interest beyond that specified, since no statute provides for the payment of interest upon a claim grounded in Section 2 of the Indian Claims Commission Act (25 U.S.C. 70a), and since there was no Fifth Amendment taking, no interest accrues to petitioner.

There is no merit to petitioner's contention that this case presents a conflict in decisions of the Court of Claims with those of this Court and with its own decisions. The decision below involves the interpretation of a specific provision of an Agreement between petitioner and the United States. The cases said to be in conflict involved provisions of different treaties or agreements dissimilar to the one here. For example, in *United States* v. *Blackfeather,* 155 U.S. 180, and in *Mille Lac Chippewas* v. *United States,* 47 Ct. Cl. 415, 462, reversed on other grounds, 229 U.S. 498, further proceedings, 51 Ct. Cl. 400, 407–408, upon which petitioner relies, the pertinent treaty or agreement provided for payment of interest on a sum not definitely ascertained and clearly conveyed that interest be paid on all the proceeds. In contrast, the agreement here—specifying a fixed sum on which interest was to be, and actually was, paid—precludes the broad interpretation that Congress intended or authorized interest to be paid on further amounts.

2. In any event, the petition is premature. As we have pointed out, petitioner has not yet been adjudged entitled to recover any amount from the United States. Should the Indian Claims Commission, on remand from the Court of Claims, determine the substantive issue adversely to petitioner, the question of interest would be moot. On the other hand, should the Commission and the court below grant recovery (but without interest), petitioner at that time may seek review in this Court of the determination that it is not entitled to interest on the amount recovered. See *Mercer* v. *Theriot,* 377 U.S. 152; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U.S. 251, 257–258; cf. Stern & Gressman, *Supreme Court Practice* § 4–19 (3d ed. 1962).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1967.

APPENDIX

The pertinent provision of the Agreement with the Nez Perce Indians in Idaho, 28 Stat. 286, 326, 329–330, is as follows:

ARTICLE III

> In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid the United States stipulates and agrees to pay to the said Nez Perce Indians the sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars, of which amount the sum of six hundred and twenty-six thousand two hundred and twenty-two dollars shall be paid to said Indians per capita as soon as practicable after the ratification of this agreement. The remainder of said sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars shall be deposited in the Treasury of the United States to the credit of the "Nez Perces Indians, of Idaho," and shall bear interest at the rate of five per centum per annum, which principal and interest shall be paid to said Indians per capita as follows, to wit: At the expiration of one year from the date of the ratification of this agreement the sum of fifty thousand dollars, and semiannually thereafter the sum of one hundred and fifty thousand dollars with the interest on the unexpended portion of the fund of one million dollars until the entire

amount shall have been paid, and no part of the funds to be derived from the cession of lands by this agreement made shall be diverted or withheld from the disposition made by this article on account of any depredation or other act committed by any Nez Perce Indian, prior to the execution of this agreement, but the same shall be actually paid to the Indians in cash, in the manner and at the times as herein stipulated.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1041

NEZ PERCE TRIBE OF INDIANS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Claims

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REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The claim for interest is not premature. The Court of Claims discussed the issue at length, and decided it, plainly regarding it as ripe for decision. The court did not make an award to petitioner in any certain amount, but it decided that the compensation paid to petitioner was unconscionable, leaving it to the Indian Claims Commission, on remand, to determine the precise amount of the recovery. An award in *some* amount will certainly follow and the interest question is as ripe as if the court had made an award of a sum certain. To hold the interest question premature, especially after it has been dis-

posed of by the Court of Claims, would be to promote uncertainty among the parties (hence interfere with settlement possibilities), and encourage multiplicity of litigation.

However, if this Court should decide the issue is premature, we ask that it so indicate in its order so as to leave petitioner without prejudice.

Respectfully submitted,

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